

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH THURURA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

NO. 2:22-CV-0037-TOR

ORDER ON MOTIONS TO DISMISS,
STAY DISCOVERY, AMEND
COMPLAINT, APPOINT COUNSEL,
AND CEASE AND DESIST
INTERROGATIONS

BEFORE THE COURT are Defendants' Motion to Dismiss (ECF No. 4) and Motion to Stay Discovery (ECF No. 11), and Plaintiffs' Motion to Amend Complaint (ECF No. 12), Motion for Order to Appoint Counsel (ECF No. 18), and Motion for Order to Cease and Desist Interrogations (ECF No. 26). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein and the completed briefing, and is fully informed. For the reasons discussed below, Defendants' Motion to Dismiss (ECF No. 4) is **DENIED as moot**, Defendants' Motion to Stay Discovery (ECF No. 11) is **DENIED**, Plaintiffs' Motion to Amend Complaint (ECF No. 12) is **GRANTED**,

ORDER ON MOTIONS TO DISMISS, STAY DISCOVERY, AMEND
COMPLAINT, APPOINT COUNSEL, AND CEASE AND DESIST
INTERROGATIONS ~ 1

1 Plaintiffs' Motion for Order to Appoint Counsel (ECF No. 18) is **DENIED**, and
2 Plaintiffs' Motion for Order to Cease and Desist Interrogations (ECF No. 26) is
3 **DENIED**.

4 **BACKGROUND**

5 This matter concerns Plaintiffs' confinement and treatment at the Airway
6 Heights Corrections Center during the COVID-19 pandemic. Plaintiffs,
7 proceeding *pro se*, filed a Complaint in Thurston County Superior Court, which
8 was removed to this Court by Defendants on March 4, 2022. ECF No. 1.
9 Plaintiffs allege Defendants violated their constitutional rights by confining
10 Plaintiffs to cells where they could not be adequately treated, tested, or protected
11 from COVID-19; by failing to protect Plaintiffs from the use of pepper spray while
12 certain Plaintiffs were infected with COVID-19; by failing to protect Plaintiffs
13 from other COVID-19 infected inmates who were transferred around the
14 correctional facility; and by allowing COVID-19 infected employees and inmates
15 into Plaintiffs' cells. ECF No. 1-3 at 26–27, ¶¶ 199, 204–08. Plaintiffs further
16 allege Defendants negligently responded to the COVID-19 pandemic, causing
17 Plaintiffs to suffer pain and suffering, mental and emotional injury, and a loss of
18 taste and smell. *Id.* at 26, ¶¶ 200–03. Finally, Plaintiffs allege Defendants
19 breached a duty to Plaintiffs by failing to protect them from the COVID-19 virus.
20 *Id.* at 27, ¶¶ 209–11.

DISCUSSION

I. Motion to Dismiss

Defendants filed a Motion to Dismiss on March 10, 2022. ECF No. 4. In lieu of responding, Plaintiffs timely filed a First Amended Complaint. ECF No. 7. Consequently, the First Amended Complaint is now the operative complaint and Defendants' Motion to Dismiss is moot and denied accordingly. Fed. R. Civ. P. 15(a); *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015).

II. Motion to Stay Discovery

Defendants filed a Motion to Stay Discovery on March 29, 2022, premised on the pending Motion to Dismiss. ECF No. 11 at 3. Because the Motion to Dismiss is denied as moot, the Motion to Stay Discovery is unwarranted. Defendants do not advance any additional arguments as to why a stay is necessary. Therefore, the motion is denied.

III. Motion to Amend Complaint

Plaintiffs filed a Motion to Amend Complaint on March 31, 2022 after they filed a First Amended Complaint on March 24, 2022. ECF No. 12. Defendants do not oppose the motion. ECF No. 30.

Federal Rule of Civil Procedure 15(a) provides that, except in circumstances not present here, "a party may amend its pleading only with the opposing party's written consent or the court's leave," which "[t]he court should freely give . . .

1 when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has directed
2 that this policy be applied with “extreme liberality.” *Eminence Capital, LLC v.*
3 *Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (citation omitted). In ruling
4 upon a motion for leave to amend, a court must consider whether the moving party
5 acted in bad faith or unduly delayed in seeking amendment, whether the opposing
6 party would be prejudiced, whether an amendment would be futile, and whether
7 the movant previously amended the pleading. *United States v. Corinthian*
8 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). “Absent prejudice, or a strong
9 showing of any of the remaining [] factors, there exists a *presumption* under Rule
10 15(a) in favor of granting leave to amend.” *C.F. ex rel. Farnan v. Capistrano*
11 *Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011) (citation omitted).

12 Here, the Court finds amendment is permissible. Defendants do not oppose
13 Plaintiffs’ request to amend, and the Court finds there is no indication that
14 Plaintiffs move to amend in bad faith, nor that amendment would be futile.
15 Finally, at this early stage in the proceedings, the Court finds neither undue delay
16 nor that Defendants would be prejudiced by the requested amendment. The motion
17 is granted. The Court accepts the operative First Amended Complaint which
18 appears at ECF No. 7 (duplicated at ECF No. 12-1).

19 **IV. Motion to Appoint Counsel**

20 Plaintiffs filed a Motion to Appoint Counsel on April 5, 2022. ECF No. 18.

1 Plaintiffs argue appointment of counsel is necessary due to their limited access to
2 the law library in the corrections facility and because none of the attorneys they
3 contacted have responded to their requests for representation. ECF No. 18.

4 Defendants argue Plaintiffs have not demonstrated they meet the criteria for court-
5 appointed counsel. ECF No. 31 at 2.

6 Generally, a person has no right to counsel in civil actions. However, the
7 court has discretion to request counsel pursuant to 28 U.S.C. § 1915(e)(1) under
8 “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).
9 The court may only request attorneys to represent impoverished litigants, rather
10 than command them to take cases, and there is no compensation available for them.
11 *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 302 (1989); *id.* at
12 n.3. “When determining whether exceptional circumstances exist, a court must
13 consider the likelihood of success on the merits as well as the ability of the
14 petitioner to articulate his claims *pro se* in light of the complexity of the legal
15 issues involved.” *Palmer*, 560 F.3d at 570 (internal quotations and citation
16 omitted).

17 This case concerns Plaintiffs’ allegations of constitutional violations and
18 negligence relating to the circumstances of their confinement at Airway Heights
19 Corrections Center during the COVID-19 pandemic. ECF No. 7. These claims are
20 not particularly legally complex, and Plaintiffs have already demonstrated their

1 ability to articulate their claims by filing an Amended Complaint that clearly
2 describes the factual circumstances, legal claims, and relief sought in this case. *Id.*
3 Additionally, Plaintiffs Thurura and Abrams appear to have previous experience
4 litigating matters against the Department of Corrections. *See* ECF No. 31 at 3–4.
5 At this stage in the proceedings, it is too early to determine Plaintiffs’ likelihood of
6 success on the merits. Thus, Plaintiffs have not demonstrated that exceptional
7 circumstances justify appointment of counsel at this time. The motion is denied.

8 **V. Motion for Order to Cease and Desist Interrogations**

9 Plaintiffs filed a motion seeking a court order “to cease and desist any
10 further interrogations by Defendants” relating to issues alleged in the operative
11 complaint. ECF No. 26. Plaintiffs do not cite any legal authority to support their
12 motion. Therefore, the Court construes Plaintiffs’ motion as a request for
13 preliminary injunction.

14 “A preliminary injunction is ‘an extraordinary and drastic remedy, one that
15 should not be granted unless the movant, *by a clear showing*, carries the burden of
16 persuasion.’” *Lopez v. Brewer, et al.*, 680 F.3d 1068, 1072 (9th Cir. 2012)
17 (citation omitted) (emphasis in original). “A plaintiff seeking a preliminary
18 injunction must establish that he is likely to succeed on the merits, that he is likely
19 to suffer irreparable harm in the absence of preliminary relief, that the balance of
20 equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*

1 *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

2 Here, Plaintiffs have not demonstrated they are likely to succeed on the
3 merits of their claims. Therefore, Plaintiffs' construed request for a preliminary
4 injunction is denied.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

6 1. Defendants' Motion to Dismiss (ECF No. 4) is **DENIED as moot**.

7 2. Defendants' Motion to Stay Discovery (ECF No. 11) is **DENIED**.

8 3. Plaintiffs' Motion to Amend Complaint (ECF No. 12) is **GRANTED**.

9 The operative First Amended Complaint is accepted and appears at ECF
10 No. 7 (duplicated at ECF No. 12-1).


11 4. Plaintiffs' Motion for Order to Appoint Counsel (ECF No. 18) is
12 **DENIED**.

13 5. Plaintiffs' Motion for Order to Cease and Desist Interrogations (ECF No.
14 26) is **DENIED**.

15 The District Court Executive is directed to enter this Order and furnish
16 copies to the parties.

17 DATED April 28, 2022.




THOMAS O. RICE
United States District Judge